

# Virginia State Bar Council to Review the Standing Committee on Legal Ethics' Proposed Revisions to the Rules of Professional Conduct

*Pursuant to Part Six: Section IV, Paragraph 10(c)(iv) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on October 17–18, 2002, in Roanoke, Virginia, is expected to consider for approval, disapproval, or modification, a group of amendments to the Virginia Rules of Professional Conduct. The amendments are the result of a comprehensive review of the Rules of Professional Conduct by the Standing Committee on Legal Ethics (“Committee”). That review had two primary goals: (1) the Committee reviewed the American Bar Association’s Ethics 2000 initiative, which involved revising the Model Rules of Professional Conduct; and (2) the Committee reviewed Virginia’s current rules to determine, now that they have been in place since January 2000, whether any provisions need clarification. Below is a summary of the proposed revisions.*

## **Rule 1.2**

The Committee proposes to add a new paragraph to this rule, which addresses the scope of the attorney/client relationship, clarifying that a lawyer’s scope of authority includes actions taken on behalf of the client that are impliedly authorized to carry out the representation. The source of that language is the Ethics 2000 initiative; the provision mirrors existing language in Rule 1.6 regarding confidential information and is intended to strike a balance between an attorney’s professional expertise and a client’s autonomy.

## **Rule 1.3**

The Committee proposes to add a new comment to this rule to clarify that the duty of diligence includes planning for client protection in the event of the attorney’s death or disability. The purpose of that provision is to highlight the need to address the transition of client matters should the lawyer suddenly be unable to continue the representation.

## **Rule 1.4**

The Committee proposes two clarifying revisions on this provision regarding communication. Language would be added to the rule making reference to new proposed additional paragraphs to Rule 4.4. The purpose of the amendment to Rule 1.4 is to clarify that when communicating with a client, a lawyer must exclude information governed by proposed Rule 4.4 regarding the inadvertent receipt of confidential information.

In addition, a proposed amendment to Comment 1 of this rule merely clarifies that it is mandatory, not discretionary, for an attorney to inform clients of proffered settlements and plea agreements.

## **Rule 1.5**

The Committee proposes an addition to Rule 1.5 concerning fee sharing, that provides an exception to the requirements of fee-sharing between two separate law firms or lawyers. Specifically, exceptions are proposed where an attorney leaves a firm for a new office and for successive attorneys in the same matter. The purpose of the amendment is to exempt these par-

tical contexts from the current requirement of client consent at the outset of the matter as personnel changes are not always foreseeable.

## **Rule 1.6**

The Committee proposes to add an additional circumstance in which a lawyer could disclose confidential client information. Coordinating with the amendment to the comments of Rule 1.2, outlined above, the Committee proposes to add an exception for disclosure made to protect a client’s interests in the event of the lawyer’s death or disability. The purpose of the amendment would be to allow a new lawyer to step in to close down the first lawyer’s practice, with such activities to include the new lawyer’s review of client files.

The Committee proposes an additional amendment to Rule 1.6 to clarify the relationship between the duty to protect a client’s confidentiality and the duty to report misconduct of another lawyer. The purpose of the language is to limit the circumstances when a lawyer needs client consent to report misconduct.

The Committee proposes an additional comment to this rule that would serve to clarify the relationship between the duty to protect a client’s confidentiality and the responsibilities triggered in representing a client under an impairment. The purpose of the new comment would be to establish that an attorney is not violating Rule 1.6 when following Rule 1.14, regarding clients under impairment.

The Committee proposes an additional comment that would incorporate the conclusions drawn in LEO 1723. LEO 1723, which was approved by the Virginia Supreme Court in 1999, establishes parameters for an attorney’s relationship with an insurance company while representing an insured.

The Committee proposes an additional comment to this rule that would clarify that the duty of confidentiality outlined in Rule 1.6 is triggered during an initial consultation between an attorney and a client, regardless of whether the decision is made to enter into an attorney/client relationship. The Committee concluded that the Ethics 2000’s creation of a separate rule for that context was not necessary in Virginia as the Committee believes that Rule 1.6 already applies to these initial consultations.

## **Rule 1.7**

The Committee proposes an amendment to Rule 1.7 that replaces the rule in its entirety. The new language is from the Ethics 2000 initiative. The Committee found persuasive the ABA’s contention that the current language of Rule 1.7 is ambiguous. The purpose of the proposed language is to provide a clearer test for lawyers to apply to potential conflicts of interest; nonetheless, the Committee does not believe the new language represents a substantively different test, just a clearer

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articulation of the current one. The Committee, in proposing this new language, chose not to include the ABA's requirement that consent be in writing as that requirement would have been a substantive departure from the current rule. The Committee also proposes minor changes to several comments to this rule. The purpose of those changes is to conform the language of the comments with that of the proposed rule.

Additionally, the Committee has moved language from Rule 2.2 into the comments of Rule 1.7. The purpose of this move is explained below, in the discussion of the proposed deletion of Rule 2.2.

#### **Rule 1.8**

The Committee proposes clarifying the language to paragraph (c), addressing gifts from a client to a lawyer, or to people associated with him. The source of the clarifying language is the Ethics 2000 initiative. The Committee agrees with the ABA that additional language should be added to the rule that prohibits a lawyer from soliciting a *substantial gift* from a client, regardless of whether the lawyer would need to draft a document for the gift.

The Committee proposes a new paragraph in Rule 1.8 that imputes many of the prohibitions in that rule to all lawyers in the firm. Thus, if any lawyer in a firm is prohibited from entering into certain business transactions with a client, from certain uses of client information, from accepting a client gift, from receiving certain kinds of interest in a case, from providing certain financial assistance to a client, from allowing third party influence in a case, from making certain inappropriate aggregate settlements, or from limiting malpractice liability; then every other attorney in the firm is also prohibited from those activities. The purpose of this amendment is to bring the imputation of Rule 1.8 in line with that of the conflicts of interest provisions.

#### **Rule 1.10**

One proposed amendment to this rule is to remove the imputation of Rule 1.8 (c) from Rule 1.10 and place it within Rule 1.8, itself. The purpose of this change is that, as outlined above, the Committee proposes to impute many provisions of Rule 1.8, not all of which fit within the parameters of Rule 1.10, which deals exclusively with disqualifications. For clarification, language would be added directing the reader to Rule 1.8 for imputation of prohibitions under that rule.

Another proposed amendment to this rule is to add Rule 1.6 and Rule 2.10(e) to the list of imputed disqualifications. The purpose of these changes is to confirm that all members of a firm are deemed to have access to confidential information gained by any firm member and is to prohibit any member of a mediator's firm from representing a participant from the mediation in the same matter, absent consent from the other participant.

#### **Rule 1.11**

The Committee proposes to retitle this rule to more accurately reflect the content of the rule. The proposed title would

become, "Special Conflicts of Interest for Former and Current Government Officers and Employees."

#### **Rule 1.12**

The Committee proposes several minor changes to the language of this rule. The source of the changed language is the Ethics 2000 initiative. The purpose of the language is to clarify the screening requirement of paragraph (c). Also stemming from the Ethics 2000 project, the Committee proposes certain additions to the comments of this rule. The purpose of the new comments is to clarify the requirements of this rule. The Committee declines to propose expanding this rule to include not only former judges and arbitrators but also mediators, as done by the ABA, as the Committee believes the role of a mediator is different in kind from those of a judge or arbitrator.

#### **Rule 1.13**

The Committee proposes only a technical change to this rule, improving the language of subparagraph (b)(1). The change is not intended to be substantive, but merely stylistic.

#### **Rule 1.14**

The Committee proposes language expanding this rule to address in more detail the challenges faced by a lawyer with an impaired client. The source of the proposed language is the Ethics 2000 initiative. The additional language elaborates upon appropriate steps to protect such a client and addresses the duty of confidentiality in this context. Related stylistic changes are also proposed for Comment 1 to this rule.

#### **Rule 1.15**

The Committee proposes to add a comment to this rule confirming that a lawyer may use electronic checking for his trust account so long as all requirements of the rule are met. The purpose of this rule is to allow for the use of efficient technology where such use does not undermine the security of the trust account.

#### **Rule 1.16**

The Committee proposes several amendments to paragraph (e), which deals with the contents of the client's file. Several questions regarding interpretation of this provision have arisen from both a compliance and an enforcement perspective. The purpose of all proposed changes is to rid the provision of ambiguity. Clarity has been added regarding which contents must be provided and when such provision should be made. Similarly, the Committee proposes a comment stating that the disclosure required under paragraph(e) does not require any disclosure of material by the lawyer that is otherwise prohibited by law.

#### **Rule 1.17**

The Committee proposes a clarification change to this rule. Specifically, the Committee proposes to move exceptions to the requirement of paragraph (a), regarding the sale of a law practice, from the comments to the rule. The purpose of this change is to ensure that a reader will find these exceptions when reading the rule.

### **Rule 2.2**

The Committee proposes deleting this rule and moving its substantive provisions to the comments to Rule 1.7. The purpose of this change, as first developed in the Ethics 2000 initiative, is to remove ambiguity of coverage. Currently, there could be confusion between Rule 1.7's application to joint representations and Rule 2.2's application to the lawyer's role as intermediary. As the Committee agrees with the ABA's view that the two contexts are indistinguishable, the Committee proposes for all such situations to be handled in one rule, i.e., Rule 1.7.

### **Rule 2.10**

The Committee proposes to remove the reference to Rule 2.2 in paragraph (h) as the Committee is also proposing to delete Rule 2.2 altogether. See discussion of Rule 2.2, above.

The Committee also proposes adding a comment directing the reader to Rule 1.10 regarding the imputing of certain conflicts arising under this rule. The purpose of that amendment is solely to provide helpful direction to the reader; no substantive change is intended.

### **Rule 3.4**

The Committee proposes to add language to this rule prohibiting the intentional or habitual violation of rules of procedure or evidence, where such conduct is disruptive. The purpose of this amendment is to restore language that previously appeared in the Virginia Code of Professional Conduct but was inadvertently left out of the newer Virginia Rules of Professional Conduct. That prohibition continues to be a needed component of enforcement in a number of discipline cases.

### **Rule 3.5**

The Committee proposes one technical change to this rule, correcting a typographical error in (a)(iii).

### **Rule 4.4**

The Committee proposes two new paragraphs to this rule addressing the inadvertent receipt of confidential information. The purpose of this amendment is to present the conclusions previously drawn in LEO 1702 to ensure that members of the bar will be familiar with the obligations triggered upon receipt of such information. The requirements in the rule are based upon the need to protect client confidentiality from inadvertent disclosures. The Committee also proposes adding a comment elaborating upon this point.

### **Rule 5.1**

The Committee proposes adding clarifying language to this rule and its comments. The purpose of these changes is to adopt revisions made by the Ethics 2000 initiative as the Committee considers the new ABA language to be a clearer statement of the underlying concepts.

### **Rule 5.4**

The Committee proposes adding an additional exception to the prohibition against sharing a legal fee with a non-lawyer. Specifically, an exception is proposed for arrangements made with a credit card company to afford clients the opportunity to pay legal bills with credit cards. The purpose of this additional exception is to allow a practice that in many instances may increase the public's access to legal services.

### **Rule 5.6**

The Committee proposes a minor change to the language of the first comment in this rule. The purpose of the amendment is to clarify the comment's general applicability to all lawyers.

### **Rule 6.5**

The Committee proposes a new Rule 6.5, entitled, "Non-profit and Court-annexed Limited Legal Services Programs." The language of this rule is part of the Ethics 2000 initiative. The purpose of the rule is to provide slightly less restrictive conflicts of interest rules for lawyers providing services in the context of limited legal service programs in recognition of the unique limited nature of such services and of the potential increase to the public's access to legal services.

### **Rule 8.1**

The Committee proposes to make minor clarifying changes to the introductory language to this Rule in order to provide a clearer articulation of the outlined prohibitions.

### **Rule 8.4**

The Committee proposes to make minor clarifying changes to the introductory language to this rule. The purpose of those changes is merely improved clarity of expression.

### **Inspection and Comment**

*The proposed amendments may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed amendments can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at 804-775-0557, or can be found at the Virginia State Bar's Web site at <http://www.vsb.org/profguides/proposed/index.html>.*

*Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than September 20, 2002.*

**The proposed amendments can be found in their entirety  
at <http://www.vsb.org/profguides/proposed/index.html>.**